Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

A.J. INDUSTRIES, INC.,

Petitioner,

v.

DEANE and RAYLENE HEDGES, and
WESTERN AUTO SUPPLY CO., INC.,

Respondents.

Petition For Writ Of Certiorari
To The United States Supreme Court

PETITION FOR WRIT OF CERTIORARI

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46 pp

QUESTION PRESENTED

I. Whether a trial court may properly exercise personal jurisdiction over a nonresident defendant where the nondefendant's only possible contact with the forum state is the sale of an allegedly defective product to a national distributor?

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No. _____

In The

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October Term, 1993

A.J. INDUSTRIES, INC.,

Petitioner,

v.

DEANE and RAYLENE HEDGES, and
WESTERN AUTO SUPPLY CO., INC.,

Respondents.

Petition For Writ Of Certiorari To The United States Supreme Court

PETITION FOR WRIT OF CERTIORARI

A.J. Industries respectfully petitions for a writ of certiorari to review the judgment of the Vermont Supreme Court in this case.

OPINIONS BELOW

The opinion of the Washington Superior Court (App. 4), dated September 18, 1992, is unreported. The Vermont Supreme Court's (App. 1) opinion, dated January 13, 1994, is not yet reported.

JURISDICTION

The opinion of the Vermont Supreme Court was entered on January 13, 1991. *Hedges v. Western Auto Supply Co., Inc.*, No. 92-505 slip op. (Vt., Jan. 13, 1994). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions and statutes are set forth verbatim in the Appendix:

United States Constitution

United States Constitution, Amendment XIV

Vermont Statutes

12 V.S.A. § 855

STATEMENT OF THE CASE

Plaintiffs, Deane and Raylene Hedges, allege that Mr. Hedges was injured by a defective Wizard space heater in

Montpelier, Vermont on July 27, 1988. Armstrong Products Corporation ("Armstrong"), a West Virginia corporation, manufactured the space heater in 1967 and subsequently sold it to Western Auto Supply Co., Inc. ("Western Auto"), a Missouri corporation. There is no evidence as to whom Western Auto retailed the allegedly defective space heater or as to whether Western Auto sold the Wizard space heater in Vermont. Neither Western Auto nor the Hedges allege that the heater was sold in Vermont.

On October 6, 1969, A.J. Industries, Inc. ("A.J."), a Delaware corporation, with its principal place of business in California, merged with Armstrong. At that time, Armstrong became a manufacturing division of A.J.. Western Auto argues that A.J. is a successor-in-interest to Armstrong.

In 1971, A.J. transferred the Armstrong manufacturing division to Armstrong Products Company, Inc., a Delaware corporation. Armstrong Products Company, Inc. was a financially viable corporation which followed all necessary corporate formalities until 1984, when it wound up its affairs and disposed of its remaining assets.

Neither Armstrong nor A.J. have ever been registered or licensed to do business in the State of Vermont, nor have they ever conducted any business there. In fact, there was no evidence presented below that would indicate that Armstrong or A.J. have ever been present in Vermont or solicited business from Vermont residents. Further, the undisputed evidence below demonstrated that Armstrong designed and manufactured the Wizard space heater specifically for the warm weather markets of

the southern states and that it would have been unusual to sell the Wizard space heater in a northern state like Vermont.

On April 11, 1989, the Hedges filed an action against, among others, Western Auto, for injuries caused by the allegedly defective Wizard heater. On July 1, 1991, Western Auto brought A.J. into the case by filing a third-party complaint against it. The Hedges filed a separate direct action against A.J. on July 22, 1991. On August 2, 1991, A.J. moved to dismiss the third-party complaint for lack of personal jurisdiction. A.J. filed the same motion in response to the Hedges' direct claim on August 9, 1991.

The Court delayed ruling on A.J.'s motion to permit discovery on the question of personal jurisdiction. Western Auto and the Hedges conducted discovery as to A.J. and Armstrong's contacts with Vermont. When Western Auto and the Hedges were satisfied that they had discovered all necessary and relevant evidence, they filed supplemental memoranda of law and evidentiary materials in opposition to A.J.'s motion. On August 4, 1992, the litigants appeared before the Washington County Superior Court in Montpelier, Vermont and orally argued A.J.'s pending Motion to Dismiss in a consolidated hearing.

On September 18, 1992, the Superior Court denied A.J.'s motion on both the direct and third-party claims. The Superior Court erroneously held that where a nonresident defendant manufactures a product and then sells it to an independent national distributor, the courts of the forum state may properly exercise long-arm personal

jurisdiction over the nonresident manufacturer, regardless of whether the product was actually sold by the distributor in the forum state.

A.J. subsequently moved the Superior Court for permission to appeal its ruling. The Court denied the motion on September 18, 1992. A.J. then filed a motion with the Vermont Supreme Court for interlocutory review of the Superior Court's decision. On October 28, 1992, the Vermont Supreme Court granted A.J.'s motion for permission to appeal.

By its decision of January 13, 1994, the Vermont Supreme Court affirmed the Superior Court's ruling. It held that where a nonresident manufacturer sells its product to a national distributor and the product is alleged to have caused injury to a Vermont resident, even where there is no evidence that the distributor sold the allegedly defective product in Vermont, there are adequate contacts with Vermont to support the exercise of personal jurisdiction. Otherwise stated, when Armstrong sold the Wizard space heater to Western Auto, it created sufficient minimum contacts to support the exercise of personal jurisdiction over it in every state where Western Auto conducted business by virtue of the fact that Western Auto was a national distributor. A.J. seeks review of that decision by the United States Supreme Court.

ARGUMENT

A. THE UNITED STATES SUPREME COURT SHOULD GRANT A.J.'S PETITION FOR CERTIORARI AND RULE THAT A FORUM STATE CANNOT CONSTITUTIONALLY EXERCISE PERSONAL JURISDICTION OVER A NONRESIDENT DEFENDANT WHERE ITS ONLY POSSIBLE CONTACT WITH THE FORUM STATE IS THE SALE OF AN ALLEGEDLY DEFECTIVE PRODUCT TO A NATIONAL DISTRIBUTOR.

The United States Supreme Court has created a two-part test to determine whether a trial court may properly exercise personal jurisdiction over a nonresident defendant under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. First, the evidence must show that the nonresident defendant has "minimum contacts" with the forum state. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Second, even where there are "minimum contacts," due process also requires that the exercise of jurisdiction be consistent with notions of "fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985). Accordingly, personal jurisdiction is properly exercised only where the nonresident defendant has "minimum contacts" with the forum state *and* it would not offend traditional notions of fair play and substantial justice to exercise personal jurisdiction over that defendant.

"Minimum contacts" may be established under principles of general or specific jurisdiction. *Helicopteros Nacionales de Columbia S.A. v. Hall*, 466 U.S. 408, 414, n. 9 (1984); *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 446 (1952). General jurisdiction "minimum contacts"

exist where a nonresident defendant's presence in the forum state is so "substantial and continuous" that it may be treated for the purposes of personal jurisdiction as a resident of that state. *Id.*

Since neither Armstrong nor A.J. have ever been present in Vermont, there is no evidence that they ever shipped goods to the state and there is no other proof of general contacts with Vermont which could properly be characterized as "substantial and continuous," there is no factual basis to support the exercise of general jurisdiction over A.J. in Vermont. Indeed, the Vermont Supreme Court did not find adequate "minimum contacts" on general personal jurisdiction grounds.[1] The Vermont Supreme Court's analysis turned on whether there were "minimum contacts" under specific personal jurisdiction doctrine.

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[1] Under Vermont law, it is the burden of the party seeking to invoke jurisdiction to make a prima facie showing to support its exercise. *Roman Catholic Diocese of Burlington, Inc. v. Paton Investigators, Inc.*, 145 Vt. 510, 512, 496 A.2d 151, 153 (1985). Accordingly, the Hedges and Western Auto must introduce evidence which supports their claim that the Vermont courts may properly exercise personal jurisdiction over A.J.

1. THIS COURT SHOULD AFFIRM ITS DECISION IN *ASAHI* AND CLARIFY UNDER WHAT CIRCUMSTANCES ADEQUATE "MINIMUM CONTACTS" EXIST TO SUPPORT THE EXERCISE OF SPECIFIC PERSONAL JURISDICTION OVER A NONRESIDENT MANUFACTURER.

This Court has long held that there are sufficient "minimum contacts" to support the exercise of personal jurisdiction over a nonresident defendant where the defendant should reasonably anticipate that he or she could be haled into court in the forum state. *Worldwide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980). Under specific personal jurisdiction doctrine, this standard is satisfied where the defendant "purposefully directs his or her activities toward residents of the forum state and the litigation that results arises from those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. at 472, *see also Ranno v. Sipa Press, Inc.*, 987 F.2d 580, 588 (9th Cir. 1993) (The defendant "must perform an act or consummate a transaction within the forum" and "the claim must arise out of or result from the defendant's form-related activities.")

The fact that a nonresident manufacturer should reasonably foresee that its product could enter the forum state and injure a resident of the state does not alone support the exercise of personal jurisdiction. *Worldwide Volkswagen*, at 296. ("[F]orseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.") Otherwise stated, a nonresident defendant manufacturer should reasonably anticipate that it could be haled into court in the forum state in connection with a product liability claim only where it

has purposefully availed itself of the privilege of conducting business there with respect to the product that gave rise to the ensuing litigation. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) ("[I]t is the purposeful action of the defendant, rather than the unilateral actions of third parties claiming some relation to the defendant that creates the contact with the forum state that we are searching for."); *Rudzewicz*, at 472 (Personal jurisdiction may be properly exercised "where the defendant has purposefully directed his activities at residents of the forum state and the litigation results from alleged injuries that arise out of or relate to those activities. (citation omitted).")

The Vermont Supreme Court apparently construed the sale of the Wizard space heater to a national distributor, Western Auto, as a purposeful act by A.J. to avail itself of the Vermont market. The Vermont Supreme Court reasoned that where a manufacturer places a product into the stream of commerce by selling it to an acknowledged national distributor, the manufacturer knows that the product could be retailed in any of the 50 states. Accordingly, the sale of the product is a purposeful decision by the manufacturer to market its product in all of the states where the distributor conducts business.

This so-called "stream of commerce" theory of jurisdiction is not without support in the state and federal courts. *See, e.g., Tobin v. Astra Pharmaceutical, Inc.*, 993 F.2d 528, 544 (6th Cir. 1993); *Irving v. Owens-Corning Fiberglass Corp.*, 864 F.2d 383, 386 (5th Cir. 1989); *Arguello v. Industrial Woodworking Machine Co.*, 838 P.2d 1120, 1123 (Utah 1992); *Cox v. Hazelock, Ltd.*, 411 S.E.2d 640, 644, 105 N.C.App. 52, 56, (1992), *cert. den.* ___ U.S. ___, 113 S.Ct. 78

(1992); *Charles Gendler & Co. v. Telecom Equip. Corp.*, 508 A.2d 1127, 1130, 102 N.J. 467, 471 (1986). "Stream of commerce" theory finds "minimum contacts" based on the mere fact that it is foreseeable to a nonresident manufacturer that an independent distributor may bring its product into the forum state.

"Stream of commerce" personal jurisdiction does not, however, comply with the fundamental principles of due process annunciated by this Court. As stated above, a proper "minimum contacts" analysis must focus on the acts of the defendant, not some third party, in determining whether the defendant purposefully availed itself of the forum state's market. Hence, a theory of jurisdiction that relies on the actions and intent of an independent third party, like an independent national distributor, should be found unconstitutional. *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 112 (1987) (O'Conner, J., plurality).

Indeed, the *Asahi* plurality found that a theory of personal jurisdiction that is almost wholly based on the Defendant's awareness that its product could enter the forum state is infirm. *Asahi*, at 112. There, Justice O'Conner explained:

> The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum state, for example, designing the product for the market in the forum state, advertising in the forum state, establishing channels for providing regular

> advice to customers in the forum state or marketing the product through a distributor who has agreed to serve as a sales agent in the forum state. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum state does not convert the mere act of placing that product into the stream of commerce into an act purposefully directed toward the forum state.

Asahi, at 112. Otherwise stated, in order to establish that a nonresident purposefully availed itself of a forum state's market, the evidence must show purposeful conduct of the nonresident defendant directed at or in the forum state.

As seen above, some courts have not regarded the *Asahi* plurality as binding. *See, e.g., Irving*, at 386 ("[T]he splintered view of minimum contacts in *Asahi* provides no clear guidance . . . "). Indeed, the Vermont Supreme Court, at least impliedly, rejected the *Asahi* plurality and instead chose to rely upon *Charles Gendler & Co.*, a pre-*Asahi* decision, in holding that A.J. "purposefully availed itself of Vermont's market by selling its heaters to a well-known national distributorship which did business in Vermont." *Hedges*, at 2.

Other jurisdictions have followed Justice O'Conner's reasoning and have held that the "minimum contacts" standard is satisfied only where the evidence shows that the nonresident defendant's conduct created the contacts with the forum state. *E.g., Boit v. Gar-Tech Products, Inc.*, 967 F.2d 671, 683 (1st Cir. 1992) (plaintiffs failed to make prima facie showing sufficient to support the exercise of personal jurisdiction where nonresident manufacturer's

only contact with the forum state was the sale of an allegedly defective product to a mail-order company which did business in the forum state); *Madara v. Hall*, 916 F.2d 1510, 1516-1517 (7th Cir. 1990); *Raths v. United States of America*, 911 F.2d 738, 1990 WL 118916 (9th Cir. 1990); *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 375-76 (8th Cir. 1990); *Nguyen v. Rapid Granulator, Inc.*, slip op., No. 89-8307, 1991 WL 85352 (E.D. Pa. May 15, 1991); *Larose v. Sponco Mfg., Inc.*, 712 F.Supp. 455 (D.N.J. 1989); *Smith v. Dainichi Kinzoku Kogyo Ltd.*, 680 F.Supp. 847, 853 (W.D. Tex. 1988).

The United States Supreme Court should, in granting A.J.'s petition for certiorari, clarify any possible uncertainty as to whether *Asahi* binds the lower courts and rule that the *Asahi* plurality set forth the proper standard on the question of specific personal jurisdiction. If, indeed, due process requires some meaningful connection between the forum state and the nonresident defendant, our courts should not exercise jurisdiction where the only conceivable contact with a forum state is the sale of a product to an independent entity outside of that state. *Boit*, at 683. Such facts only show that it is foreseeable that the product might enter the forum state, not that the manufacturer purposefully availed itself of the forum state's market.

The facts before the Vermont Supreme Court in this matter did not support a finding of "minimum contacts" with Vermont under *Asahi*. A.J. did not sell the allegedly defective Wizard heater in Vermont or to a Vermont resident. A.J. did not ship the heater to Vermont and it did not advertise or provide customer service in Vermont. A.J. merely sold the Wizard space heater to a distributor

which selected where it would retail the product. The fact that the heater found its way into Vermont and allegedly injured a Vermont resident should not, without other contacts, support the exercise of jurisdiction by the Vermont courts over A.J.[2] The Vermont Supreme Court, therefore, erred in holding that A.J. was subject to personal jurisdiction in Vermont.

2. THE SUPREME COURT SHOULD GRANT A.J.'S PETITION IN ORDER TO CLARIFY WHEN THE EXERCISE OF SPECIFIC PERSONAL JURISDICTION OFFENDS TRADITIONAL NOTIONS OF SUBSTANTIAL JUSTICE AND FAIR PLAY.

Where there are "minimum contacts" with a forum state, the courts there must determine whether the exercise of personal jurisdiction would nonetheless offend traditional notions of substantial justice and fair play. *Rudzewicz*, at 477; *Worldwide Volkswagen*, at 292. A trial court should refrain from exercising jurisdiction where, notwithstanding the existence of "minimum contacts," it would be unreasonable and unfair to exercise personal jurisdiction over the nonresident in the forum state. *Asahi*, at 121.

Under the above-standard, the Vermont courts should not exercise jurisdiction over A.J. because the

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[2] This is particularly true since there has been no showing that the Wizard heater was sold by anyone in Vermont. Under *Worldwide Volkswagen*, the unilateral act of a plaintiff in bringing a product into the forum state does create contacts with the forum state as to a defendant. *Worldwide Volkswagen*, at 297.

connection between A.J. and Vermont is at best slim. It is claimed that A.J.'s predecessor in interest manufactured a product in 1967 that caused injuries in Vermont, a state where neither A.J. nor its predecessor in interest ever did business. There is no evidence that the allegedly defective product was sold in Vermont. Further, none of the defense witnesses or evidence in this action are located in Vermont. In short, even if there are "minimum contacts" with Vermont, they are so slight that to exercise jurisdiction over A.J. in Vermont would violate traditional notions of fair play and substantial justice and would, therefore, be unconstitutional.

The Vermont Supreme Court apparently did not find it unreasonable to exercise personal jurisdiction under such circumstances. Hence, this Court should review and overturn the Vermont Supreme Court's decision.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 10, 1994.

APPENDIX

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ENTRY ORDER

SUPREME COURT DOCKET NO. 92-505

DECEMBER TERM, 1993

Deane and Raylene Hedges	)	APPEALED FROM:
v.	)	Washington Superior Court
Western Auto Supply Co., Inc., Petrolane Gas Service, Inc., June S. Warren, and Armstrong Products Co.	)	DOCKET NOS. S221-89 WnC S473-91 WnC
and	)	(Filed Jan. 13, 1994)
Western Auto Supply Co., Inc.	)	
v.	)	
A.J. Industries, Inc.	)	

In the above entitled cause the Clerk will enter:

The sole issue before us in this interlocutory appeal is whether defendant A.J. Industries has sufficient contacts with Vermont to support personal jurisdiction here under the Due Process Clause of the United States Constitution. We affirm the superior court's decision upholding Vermont's jurisdiction.

Armstrong Products, a manufacturer from West Virginia, merged in 1969 with A.J. Industries, a Delaware corporation doing business principally in California. In 1971, Armstrong became a division of A.J. A.J. transferred Armstrong Division to Armstrong Products, a Delaware corporation, which in 1984 went out of business. For

convenience, we refer to Armstrong and A.J. interchangeably.

In 1967, Armstrong manufactured "Wizard" space heaters, one of which was alleged by plaintiffs to have been defective. As a result, plaintiff Deane Hedges was injured when it tipped over, causing an explosion where he was working near Berlin, Vermont, in the summer of 1988. Armstrong sold the space heaters to Western Auto, which, in turn, distributed them nationally, including in Vermont. Although the line of heaters in question was designed primarily for a southern market, there were no geographical restrictions on their distribution. The record does not disclose how Hedges came into possession of the unit injuring him.

Armstrong moved to dismiss for lack of personal jurisdiction on the grounds that it was not actively conducting business in Vermont and was not licensed or registered to do business here. V.R.C.P. 12(b)(2). The superior court denied the motion, and we granted Armstrong permission to appeal.

The law applicable to this appeal is extensively set forth in *Northern Aircraft, Inc. v. Reed*, 154 Vt. 36, 40-44, 572 A.2d 1382, 1385-87 (1990), and need not be repeated here. We agree with the trial court that Armstrong "purposely availed" itself of Vermont's market by selling its heaters to a well-known national distributorship which does business in Vermont.

Armstrong argues that no evidence shows that the heater in question or any of its heaters were sold in Vermont. It may be presumed, however, that once a national distributor markets its products, the market is

national, and includes Vermont. No evidence to the contrary was introduced by Armstrong. *Charles Gendler & Co. v. Telecom Equipment Corp.*, 508 A.2d 1127 (N.J. 1986) (distribution of products nationwide gives rise to reasonable expectation that manufacturer is subject to jurisdiction in every state).

Nor has Armstrong advanced any compelling reason why jurisdiction over it would offend " 'traditional notions of fair play and substantial justice.' " *Northern Aircraft*, 154 Vt. at 41 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))). The weight of the factors relevant to litigating here as opposed to another state (relative burdens on the parties and interests of the forums) decidedly favors Vermont as the more appropriate forum. The accident occurred here.

Affirmed.

BY THE COURT:

/s/ Ernest W. Gibson III
Ernest W. Gibson III,
Associate Justice

/s/ John A. Dooley
John A. Dooley,
Associate Justice

/s/ James L. Morse
James L. Morse,
Associate Justice

/s/ Denise R. Johnson
Denise R. Johnson,
Associate Justice

[✓] Publish

[ ] Do Not Publish

STATE OF VERMONT

WASHINGTON COUNTY, ss.

Deane Hedges and
Raylene Hedges,
Plaintiffs,

vs.

Western Auto Supply Co.,
Petrolane Gas Service, Inc.,
June S. Warren, and Armstrong
Products Co., a division of A.J.
Industries Inc., a Delaware
corporation, jointly and severally,
Defendants.

Superior Court

Docket
No. 221-89 WnC

Western Auto Supply Co.,
Third-Party Plaintiff,

vs.

A.J. Industries, Inc., a Delaware
corporation, as survivor of
Armstrong Products Corporation,
Third-Party Defendant.

RULING ON MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

(Filed Sept. 11, 1992)

Defendant A.J. Industries, Inc. ("A.J.") moves the court pursuant to V.R.C.P. 12(b)(2) to dismiss the claims brought against it by plaintiffs Deane and Raylene Hedges and defendant Western Auto Supply, Inc. ("Western") for lack of personal jurisdiction. The matter came before the court on August 4, 1992. Plaintiffs Dean [sic]

and Raylene Hedges were represented by Patrick Biggam, Esq. and Stanley White, Esq., a member of the Michigan Bar. Western Auto Supply Co. was represented by Thomas E. McCormick, Esq. and Lori R. Choiniere, Esq. Armstrong Products Co. was represented by Peter S. Cullen, Esq. and A.J. Industries, Inc. was represented by Pietro J. Lynn, Esq. and James W. Spink, Esq.

OPINION

Deane and Raylene Hedges have brought an action against a number of parties, including A.J. and Western. Plaintiffs assert that they were injured by a defective Wizard space heater allegedly manufactured by A.J., a successor in interest to a company called Armstrong Products Corporation and sold to plaintiffs through Western. A.J. is a Delaware corporation with its principal place of business in California. A.J. claims that it has never been licensed or registered to do business in Vermont, nor has it conducted business within the state. It is A.J.'s position therefore that the court of Vermont lacks personal jurisdiction over it.

V.R.C.P. 12(b)(2) allows a party to challenge personal jurisdiction via a motion to dismiss. In *Roman Catholic Diocese of Burlington v. Paton Insulators, Inc.*, 146 Vt. 294, 296 (1985), our Supreme court held that the trial courts have "considerable procedural leeway" in deciding this type of motion. In this case, the court will decide the motion based on the law and the supporting affidavits and depositions. "If the court chooses to determine the issues on the basis of affidavits alone . . . the plaintiff is

only required to make a prima facie showing of jurisdiction, that is, he need only demonstrate facts which support a finding of jurisdiction in order to avoid a motion to dismiss." (citation omitted). In these circumstances it is proper to make supporting findings of fact. *Id.*

The court finds that Armstrong Products Corporation manufactured the Wizard space heater at issue in 1967. *Deposition of William Chatfield*, dated December 27, 1991 ("Chatfield Dep.") at pp. 22, 49. The space heater was sold to Western, a Delaware corporation engaged in the distribution and sale of consumer goods throughout the United States, including Vermont. Armstrong and Western had a contractual relationship in which Western purchased considerable numbers of space heaters from Armstrong for national distribution. Chatfield Dep. at pp. 17-18. Armstrong also distributed its various products through other nationwide retailers such as Montgomery Ward and Sears Roebuck. *Id.* p. 21. Armstrong merged with A.J. in 1969.

When asked if the Wizard was manufactured for distribution and sale throughout the United States, Mr. Chatfield replied that the heaters were to be sold "wherever they could find a market," although the heater was primarily designed for the South and Southwest and was not particularly suited to northern climates. *Id.* at p. 16. When asked if Armstrong had restricted the sale of its heaters to a particular market, Mr. Chatfield stated that he could not recall any such restrictions. *Id.* at p. 17.

Conclusions of Law

A.J. takes the position that there is no evidence that the allegedly defective space heater was sold in Vermont, and because of the heater's design for warmer climates that it is more likely that the heater was purchased outside the state. A.J. asserts that even if the heater was purchased by plaintiffs via a Vermont outlet of Western, A.J.'s contacts with Vermont are insufficient as a matter of law for Vermont to exercise personal jurisdiction over it.

Vermont's long arm statute reflects a policy to assert jurisdiction over defendants to the full extent permitted by the due process clause. *Northern Aircraft v Reed*, 154 Vt 36, 40 (1990). In order to exercise proper jurisdiction over out-of-state defendants a two-part test must be satisfied. First, the out-of-state defendant must have "minimum contacts" with the forum state. *Id.* at 41. Second, if minimum contacts are found, due process requires that any exercise of jurisdiction be consistent with notions of "fair play and substantial justice." *Burger King v Rudzewicz*, 471 U.S. 462, 474 (1985).

In order to satisfy the minimum contacts requirement, the critical factor is whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Northern Aircraft v Reed* at 41, citing *World Wide Volkswagen Corp. v Woodson*, 444 U.S. 286, 297. The standard of reasonable anticipation is fulfilled when it can be shown that the defendant "purposoely availed" herself of the forum state. *Northern Aircraft v Reed* at 42. Purposeful

availment of a forum state's market occurs when a manufacturer places its items into the forum state through a distributor. *Pasquele v Genovese* 136 Vt 417 (1978).

In *Pasquele,* defendant Volkswagen's deliberate distribution of cars to Vermont retailers through a New Jersey distributor was held to meet the minimum contacts standard required for jurisdiction. The court found that sufficient participation in the Vermont market occurred because of the "chain of manufacture and distribution set up for the purpose and through eventual sale of the vehicle in question in Vermont." *Pasquele v Genovese* at 421.

The reasoning of *Pasquele* fits with the "stream of commerce" theory which subjects manufacturers to personal jurisdiction wherever its products are sold, whether sold directly or indirectly. *World Wide Volkswagen v Woodson,* 444 U.S. 286 (1980). This theory emphasizes the notion that delivery by a manufacturer of a product into the stream of commerce provides fair warning that the manufacturer can be subjected to suit wherever the product is distributed. *Burger King Corp v Rudzewicz,* 105 S.Ct. 2174, 471 U.S. 462 (1985).

A situation similar to the case at bar was addressed in *Charles Gendler & Co. v Telecom Equipment Corp.,* 508 A.2d 1127, 102 N.J. 460 (1986). In *Gendler,* Nippon, a Japanese corporation, contested the ability of New Jersey to exercise legal jurisdiction, claiming that there was insufficient contract between Nippon and New Jersey to establish the requisite jurisdiction. Nippon sold the product in question to an American subsidiary, which then sold Nippon's product to a New York corporation. The

New York corporation subsequently sold the product to a New Jersey corporation.

Gendler stands for the proposition that the stream of commerce theory can be used to establish jurisdiction over a foreign company. According to *Gendler*, "a manufacturer that knows its products are distributed through a nationwide distribution system should reasonably expect that those products would be sold throughout the fifty states and that it will be subject to the jurisdiction of every state". *Id.* at 1138. For a manufacturer who chooses nationwide distribution, "the sale of its product in a distant state is not an isolated event", and "it is fair to subject them to jurisdiction." *Id.* at 1136. *Gendler* emphasizes that a manufacturer who places its products into the stream of commerce "derives both legal and economic benefits from the states in which its products are sold", and is proof of a manufacturer's "purposeful penetration" of the market. *Id.* at 1136. Moreover, as a matter of policy it would be unfair to allow manufacturers to escape responsibility for their actions because of the use of intermediaries to sell their products. *Id.* at 1137. On the other hand, *Gendler* acknowledges that "a manufacturer that prohibits the distribution of its products in a particular state would not reasonably expect its products to be sold in that state", and thus would not be subject to jurisdiction in that state. *Id.* at 1138.

In this case, A.J. Industries placed their product into the national stream of commerce by selling it to three nationwide distributors: Western Auto, Montgomery Ward, and Sears Roebuck. There is no evidence before the court that A.J. took any action to restrict the sale of their

product in specific states; conversely, the Chatfield deposition supports the conclusion that A.J.'s predecessor sought to sell the Wizard "wherever they could find a market." A.J. has presented no deposition or affidavit evidence to support its position that sales of the Wizard were contractually restricted to the South and Southwest. Based on the Chatfield deposition and Western's status as a nationwide retailer, the court rules that Western has met its burden under *Roman Catholic Diocese* of making a prima facie showing of jurisdiction.

A.J.'s argument that they were not given "fair warning" within the meaning of *Burger King* that selling the Wizard to a nationwide distributor could result in being haled into a Vermont court is unpersuasive. As the *Gendler* Court stated, "as applied to a manufacturer, the stream-of-commerce theory supports the exercise of jurisdiction if the manufacturer knew or reasonably should have known of the distribution system through which its products were being sold in the forum state," (citations omitted). *Id.* at 1137. As it was foreseeable that A.J. would derive legal and economic benefits from the sale of the Wizard in every state, A.J. could reasonably anticipate litigation concerning the Wizard in every state, including Vermont.

As a prima facie showing of minimum contacts have been established, the court next considers the second prong of the two-part test. Assertion of personal jurisdiction must not offend "traditoinal notions of fair play and substantial justice". *Northern Aircraft v Reed* at 41, citing *International Shoe v Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, ___, (1945). In order to defeat jurisdiction, defendant "must present a compelling case that the presence of

some other considerations would render jurisdiction unreasonable," *Burger King Corp. v Rudzewicz* at 2185. Factors to be considered in this decision are: "the burden on the defendant, the interests on the forum state, the plaintiff's interest in obtaining relief", as well as interstate judicial economy interests. *Northern Aircraft v Reed* at 42, citing *World Wide Volkswagen Corp v Woodson* at 292.

Although defendant's status as an out-of-state corporation may make it inconvenient for A.J. to litigate in Vermont, it is recognized that a state such as Vermont has a compelling interest in being able to provide a forum for an injured resident against an out-of-state manufacturer. *See Gendler,* 508 A.2d at 1139. Vermont also represents the most efficient forum for obtaining relief. The injury occurred here, and the plaintiffs and witnesses to the alleged accident are to be found here. The extent of the plaintiff's pecuniary loss is best determined in the state where they reside.

Finally, litigating the action within a single forum presents the most efficient way for resolving this case. It would better serve the interests of interstate judicial economy and convenience if the entire matter were litigated in Vermont. Viewed in this light, the court finds that the remaining *Northern Aircraft* factors weigh in favor of Vermont jurisdiction and that "fair play and substantial justice" would not be offended.

ORDER

Defendant A.J.'s motion to dismiss for lack of personal jurisdiction is DENIED.

Dated at Montpelier, Vermont, this 10th day of September, 1992.

/s/ Stephen B. Martin
Hon. Stephen B. Martin
Superior Court Judge

ENTRY ORDER

SUPREME COURT DOCKET NO. 92-505

OCTOBER TERM, 1992

Deane and Raylene Hedges v. Western Auto Supply Co., Inc., Petrolane Gas Service, Inc., June S. Warren, and Armstrong Products Co. v. Western Auto Supply Co., Inc. v. A.J. Industries, Inc.	APPEALED FROM: Washington Superior Court DOCKET NOS. S221-89 WnC S473-91 WnC (Filed Oct. 28, 1992)

In the above entitled cause the Clerk will enter:

Defendant's motion for permission to appeal, which was timely filed with the superior court, see V.R.C.P. 6(a) (when prescribed period is less than 11 days, intermediate weekends and holidays are excluded from computation), is granted.

BY THE COURT:

/s/ Ernest W. Gibson III
Ernest W. Gibson III,
Associate Justice

[ ] Publish

[ ] Do Not Publish

/s/ John A. Dooley
John A. Dooley,
Associate Justice

/s/ James L. Morse
James L. Morse,
Associate Justice

/s/ Denise R. Johnson
Denise R. Johnson,
Associate Justice

Hold for memo until: _____

STATE OF VERMONT

[ ] DISTRICT COURT OF VERMONT

[x] SUPERIOR COURT OF VERMONT

Unit No.	Circuit County	Docket Number
	WASHINGTON	S-211-89 & S-473-91 WnC

DEANE HEDGES, et al
WESTERN AUTO SUPPLY CO., INC.

V

WESTERN AUTO SUPPLY CO., INC.
A.J. INDUSTRIES, INC.

ENTRY REGARDING MOTION

(Filed Oct. 5, 1992)

Title of Motion: MO. FOR PERMISSION TO APPEAL

Date Motion Filed: 9/25/92

Party Filing Motion: [ ] Plaintiff/State _____

[x] Defendant A.J. Industries, Inc.

[ ] Other _____

Date Response Filed: _____

("NONE" If None Filed)

Compliance by _____

____ Granted

__X__ Denied

____ Scheduled for hearing on: _____ (Date) at _____ (Time);

Time Alloted _____

____ Other

/s/ Stephen B. Martin
Presiding Judge

_____
Assistant Judge

_____
Assistant Judge

10/2/92
Date

Date copies sent to:

Plaintiff/State Patrick Biggam, Esq.

Defense Douglas Pierson, Esq.

Other Richard Steinberg, Esq.

Peter Cullen, Esq.

James Spink, Esq.

Clerk's Initials ssh

STATE OF VERMONT
WASHINGTON COUNTY, SS.

DEANE HEDGES and RAYLENE HEDGES Plaintiffs v. WESTERN AUTO SUPPLY CO., INC., Defendant/Cross-Claim Plaintiff and Third-Party Plaintiff v. ARMSTRONG PRODUCTS COMPANY, a Division of A.J. Industries, Inc., a Delaware corporation, jointly and severally, Cross-Claim Defendant and A.J. INDUSTRIES, INC., a Delaware corporation, as survivor of Armstrong Products Corporation, Third-Party Defendant	)	WASHINGTON SUPERIOR COURT Docket No. S221-89 WnC

AFFIDAVIT OF JOSEPH H. BREUER

NOW COMES Joseph H. Breuer, being duly deposed and sworn, states as follows:

1. The information contained in this affidavit is based upon my own personal knowledge.

2. I was employed by A.J. Industries, Inc. ("A.J. Industries") from 1964 to 1984.

3. From 1971 to August 1, 1984 I served as Treasurer of A.J. Industries.

4. A.J. Industries was, during the time of my employment, a Delaware Corporation with its principal place of business in California.

5. A.J. Industries did not manufacture the Wizard Space Heater, Model No. ARP7002A76 that the Plaintiffs, in their Complaint, have alleged was defective and caused their injuries.

6. A.J. Industries has never been registered or licensed to do business in the State of Vermont, nor has it, to the best of my knowledge, ever conducted business in the State of Vermont.

Subscribed and sworn to under the pains and penalties of perjury this 31st day of July, 1991.

/s/ Joseph H. Breuer
Joseph H. Breuer

STATE OF CALIFORNIA)
) ss.
LOS ANGELES COUNTY,)

At the City of Pasadena, in said County this 31st day of July, 1991, personally appeared JOSEPH H. BREUER and he acknowledged this instrument subscribed and sworn to by him to be his free act and deed.

/s/ Linda M. Schube
Notary Public

[SEAL]

OFFICIAL SEAL
LINDA M. SCHUBE
Notary Public California
LOS ANGELES COUNTY
My Commission Expires
August 6, 1994

STATE OF VERMONT
WASHINGTON COUNTY, SS.

DEANE HEDGES and RAYLENE HEDGES Plaintiffs v. WESTERN AUTO SUPPLY CO., INC., Defendant/Cross-Claim Plaintiff and Third-Party Plaintiff v. ARMSTRONG PRODUCTS COMPANY, a Division of A.J. Industries, Inc., a Delaware corporation, jointly and severally, Cross-Claim Defendant and A.J. INDUSTRIES, INC., a Delaware corporation, as survivor of Armstrong Products Corporation, Third-Party Defendant	)	WASHINGTON SUPERIOR COURT Docket No. S221-89 WnC

AFFIDAVIT OF GREGORY CATRAMBONE

NOW COMES Gregory Catrambone, being duly deposed and sworn, states as follows:

1. The information contained in this affidavit is based upon my own personal knowledge.

2. I was Chief Financial Officer of A.J. Industries, Inc. ("A.J. Industries") from August 1, 1984 to June 30, 1990.

3. A.J. Industries is a Delaware Corporation with its principal place of business in California.

4. A.J. Industries did not manufacture the Wizard Space Heater, Nodel [sic] No. ARP7002A76 that the Plaintiffs, in their Complaint, have alleged was defective and caused their injuries.

5. A. J. Industries, to the best of my knowledge, has never been registered or licensed to do business in the State of Vermont, nor has it to the best of my knowledge ever conducted business in the State of Vermont.

Subscribed and sworn to under the pains and penalties of perjury this 1st day of August, 1991.

/s/ Gregory Catrambone
GREGORY CATRAMBONE

STATE OF CALIFORNIA)
) ss.
LOS ANGELES COUNTRY [sic],)

At the City of Rosemead, in said County this 1st day of August, 1991, personally appeared JOHN HAAKE and he acknowledged this instrument subscribed and sworn to by him to be his free act and deed.

/s/ Linda L. Gavin
Notary Public

[SEAL]

OFFICIAL SEAL
LINDA L. GAVIN
NOTARY PUBLIC – CALIFORNIA
LOS ANGELES COUNTY
My Comm., expires MAY 6, 1994

STATE OF VERMONT
WASHINGTON COUNTY, SS.

DEANE HEDGES and RAYLENE HEDGES, Plaintiffs v. WESTERN AUTO SUPPLY CO., INC., Defendant/Cross-Claim Plaintiff and Third-Party Plaintiff v. ARMSTRONG PRODUCTS COMPANY, a Division of A.J. INDUSTRIES, INC., a Delaware corporation, jointly and serverally, Cross-Claim Defendant and A.J. INDUSTRIES, INC., a Delaware corporation, as survivor of Armstrong Products Corporation, Third-Party Defendant	)	WASHINGTON SUPERIOR COURT Docket No. S221-89 WnC

AFFIDAVIT OF JOHN HAAKE

NOW COMES, John Haake, being duly deposed and sworn, states as follows:

1. The information contained in this affidavit is based upon my own personal knowledge.

2. I am now and at all times since June 30, 1990 have been Chief Financial Officer of A.J. Industries, Inc. ("A.J. Industries").

3. A.J. Industries is a Delaware Corporation with its principal place of business in California.

4. A.J. Industries did not manufacture the Wizard Space Heater, Model No. ARP 7002A76 that the Plaintiffs, in their Complaint, have alleged was defective and caused their injuries.

5. A.J. Industries, to the best of my knowledge, has never been registered or licensed to do business in the State of Vermont, nor has it to the best of my knowledge ever conducted business in the State of Vermont.

Subscribed and sworn to under the pains and penalties of perjury this 1st day of August, 1991.

/s/ John Haake
JOHN HAAKE

STATE OF CALIFORNIA)
) ss.
LOS ANGELES COUNTRY,)

At the City of Rosemead, in said County this 1st day of August, 1991, personally appeared JOHN HAAKE and he acknowledged this instrument subscribed and sworn to by him to be his free act and deed.

/s/ Linda L. Gavin
Notary Public

[SEAL]

AMENDMENT XIV – CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Materials for the Citizenship and Privileges and Immunities Clauses of Section 1 are set out in this volume. See the following three volumes for materials pertaining to the Due Process and Equal Protection Clauses of that section and Sections 2 to 5.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be

reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

§ 855. Doing business as appointment of process agent

If the contact with the state or the activity in the state of a foreign corporation, or the contact or activity imputable to it, is sufficient to support a Vermont personal judgment against it the contact or activity shall be deemed to be doing business in Vermont by that foreign corporation and shall be equivalent to the appointment by it of the secretary of the state of Vermont and his successors to be its true and lawful attorney upon whom may be served all lawful process in any action or proceedings against it arising or growing out of that contact or activity, and also shall be deemed to be its agreement that any process against it which is so served upon the secretary of state shall be of the same legal force and effect as if served on the foreign corporation at its principal place of business in the state or country where it is incorporated according to the law of the state or country. – Amended 1967, No. 353 (Adj. Sess.), § 5, eff. July 1, 1968; 1971, No. 185 (Adj. Sess.), § 43, eff. March 29, 1972.